(8) (10)

Nos. 86-509 and 86-564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

—v.—

BEATY MAE GILLIARD, ET AL.,

Appellee.

PHILLIP J. KIRK, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, ET AL.,

Appellant,

—v.—

BEATY MAE GILLIARD, ET AL.,

Appellee.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE FOOD RESEARCH ACTION CENTER, AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF THE APPELLEES

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6 APP

QUESTION PRESENTED

May the government, consistent with the constitutional protections accorded family matters, require that children receiving child support assign to the state their right to that support as a condition to the receipt of public assistance by half-siblings not receiving child support payments?

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INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide non-partisan organization of over 250,000 members. The ACLU has a long-standing interest in the rights of individuals and families to privacy and autonomy from unwarranted governmental intrusion and in the maintenance of chosen familial, associational, and living arrangements. The ACLU maintains active Children's Rights and Women's Rights Projects and has appeared before this Court on numerous occasions, both as amicus and as representatives of parties before the Court in cases implicating values of privacy, family, individual autonomy, and the rights of children.

The Food Research and Action Center engages in litigation, policy analysis,

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1/ Letters of consent to the filing of this brief from attorneys to the parties have been filed with the Clerk of the Court.

public education, and research on nutrition and food issues affecting low-income persons. The National Legal Aid and Defender Association is a private, non-profit membership organization that represents over 2,300 civil legal aid and public defenders' offices nationwide. Those civil programs in 1985 represented 1.5 million clients, many of whom would be affected by the outcome of this case.

SUMMARY OF ARGUMENT

This Court has declared that "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977). At issue in this case is a statute that tears at familial bonds and directly and substantially burdens family decisions. Such an intrusion upon fundamental rights so rooted in this Nation's heritage requires heightened scrutiny by this Court.

The statute at issue in this case requires that in order for a family to obtain AFDC benefits for the children of the household, any half-siblings in the house receiving independent child support from their absent parent -- support intended for and utilized by those children alone -- must

be surrendered to the state. In short, the statute requires that the state "attach" independent child support payments to one non-custodial parent's children if another's are to receive any support. These children, who prior to this statute's enactment would have received private support payments from their own, non-custodial parent, instead must join their half-siblings as public assistance recipients if their half-siblings are to be eligible themselves.

This requirement burdens the core of the fundamental interest in family life: the relationships and interactions between family members. Non-custodial parents are stripped of their ability to support their own children, and must instead watch their children join the public assistance rolls while their still-required support payments go instead to the state's coffers. Young children are put to a choice between a

continued support relationship with their natural parents or the availability of subsistence for their half-siblings. The custodial parent is required to choose between retaining one child's minimal support from the non-custodial parent, or obtaining another child's means of subsistence from AFDC. In sum, the statute acts to divide the house against itself, a situation that cannot withstand constitutional scrutiny.

Appellants argue that so extreme a burdening of fundamental rights need be subjected only to minimum rationality review because this case concerns welfare benefits. This Court's decisions in countless areas make clear, however, that the substantial burdening of a fundamental right must be accorded heightened scrutiny. Where the burden is direct and substantial, as it is here, even in the context of social welfare legislation this Court has applied a higher standard of review.

Even under minimal scrutiny, however, the statute at issue here must fall. It is utterly irrational. It increases welfare dependency while lowering family income -- all in the name of allocating scarcer welfare resources. It discourages child support payments by absent parents, and interrupts only those support relationships that have been successful and on-going -- all in the name of encouraging child support and family security. And it takes away from children virtually all the support they receive from a parent in the name of recouping the incremental savings a family realizes by sharing overhead.

Such a statute is utterly irrational. On its face it clearly does not achieve its purported goals. This Court must not allow so irrational and unconstitutional an invasion of fundamental rights to stand.

ARGUMENT

THE STATUTE IMPERMISSIBLY INFRINGES UPON FUNDAMENTAL MATTERS OF FAMILY PRIVACY AND AUTONOMY ENTITLED TO CONSTITUTIONAL PROTECTION, REQUIRING HEIGHTENED SCRUTINY OF THE GOVERNMENTAL INTERESTS ADVANCED AND OF THE EXTENT TO WHICH THEY ARE ACTUALLY SERVED BY THE STATUTE

I. THE MATTERS OF FAMILY LIFE INVADED BY THIS STATUTE ARE CONSTITUTIONALLY PROTECTED FUNDAMENTAL RIGHTS

The statute at issue in this case, Section 402(a)(38) of the Social Security Act, 42 U.S.C. (Supp. III) §602(a)(38), grievously burdens many constitutional rights. Amici concurs in the discussion of these issues in the briefs filed by appellees and various amici in support of appellees. In this brief, however, amici address only the fundamental rights of family privacy and autonomy long recognized and guarded by this Court, upon which this statute unconstitutionally infringes.

After setting out the nature of the right protected under this Court's ruling,

amici demonstrate the ways in which the statute impermissibly interferes with private and personal family decisions and relationships. Such interference with fundamental rights must be reviewed by this Court under heightened scrutiny; amici argue, therefore, that cases cited by appellants employing only minimum rationality review are inapposite. Finally, amici demonstrate that under either standard of review the statute cannot be sustained, as it is irrational.

"This Court has long recognized that freedom of personal choices in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974). See also Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.");

Zablocki v. Redhail, 434 U.S. 374, 385 (1978) ("among the decisions that an individual may make without unjustified government interference" are "personal decisions relating to . . . family relationships . . . and child rearing and education") (quoting Carey v. Population Services Int'l, 431 U.S. 678, 684-85 (1977)); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (citing cases).

Of course, "the family is not beyond regulation." But "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." Moore, 431 U.S. at 499 (citation omitted).

The Court has struck down a number of laws that penalized free choice of family living arrangements, even though it has

upheld virtually identical restrictions that had no such impact. Particularly illustrative are Village of Belle Terre v. Borass, 416 U.S. 1 (1974), and Moore. Belle Terre upheld a suburban zoning ordinance preventing unrelated persons from living together in groups, such as "hippie communes."

Conversely, Moore struck down a virtually identical ordinance that prevented a grandmother from living with her two grandsons. In Moore a city ordinance allowed only certain types of relatives to live together in a single dwelling. Inez Moore, who lived with her son and two grandchildren who were cousins, was prosecuted because her family did not fit within any of the ordinance's defined "family units." 431 U.S. at 496-97. In striking down the ordinance as unconstitutional, the Court stressed the right of family members to live together,

concluding that "[w]hen a city undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate." Id. at 499. The Court in Moore distinguished the Belle Terre ordinance on the grounds that the latter exempted related persons from its impact. Id. at 498.

But in United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973), a case involving a statute analogous to the Belle Terre ordinance, the Court struck down a Food Stamp Act provision denying benefits to households containing unrelated persons, including so-called "hippie communes." In the context of a program "established . . . in an effort to alleviate hunger and malnutrition among the more needy elements of our society," id. at 529, the Court found the restriction of the living choices of even unrelated persons insufficiently justified by by any governmental purpose. Id. at 534-38.

As recently as 1984 the Court reaffirmed its belief that familial rights are fundamental. In Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984), the Court stated that "[p]rotecting [familial] relationships from unwarranted state interference . . . safeguards the ability independently to define one's identity that is central to any concept of liberty."

Family matters are thus firmly fixed in this Court's firmament of fundamental rights. The statute at issue goes further, however, than those struck down in the prior cases.

Section 402(a)(38) requires that a parent and all siblings living together must be included in the filing unit when a family applies for AFDC benefits. This provision was enacted specifically to require that children receiving child support payments independently of other children in the

household become part of the family unit receiving AFDC support instead. A pre-existing provision, Section 602(a)(26)(A), required that any family opting to include in the filing unit a child entitled to support payments must assign to the state any accrued right to support. By making the inclusion of such children mandatory, Section 402(a)(38) also makes it mandatory for a family seeking AFDC assistance to sign over to the state the child support payments of any other siblings who would previously have chosen to stay off public assistance and retain retain their separate subsistence support from their own parent. Under the statute, however, if a child or parent now wishes to maintain this private and traditional means of family support, no other siblings in the household may receive any public assistance.

This statute, then, does not merely burden family interests as did the

unconstitutional laws in Moore or Moreno; rather, as demonstrated infra Point II, it cuts into the very bonds of the family itself and cynically plays off family member against family member. This statute strikes more deeply and directly into the family than others this Court has struck down. Heightened scrutiny of this statute is required.

The diverse intrusions into the personal decisions central to the familial relations of the parents and children subject to this statute when taken together cut a disturbingly broad swath through the "realm of family life which the state cannot enter without substantial justification." Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

II. THE STATUE DIRECTLY AND SUBSTANTIALLY INVADES FAMILY INTERESTS BY SPLITTING THE INTERESTS OF INDIVIDUAL FAMILY MEMBERS, PITTING SIBLING AGAINST SIBLING AGAINST PARENT AGAINST PARENT, IN A MANNER ABHORENT TO "OUR HISTORY AND TRADITIONS."

As this Court has recognized, "[t]he unique role in our society of the family, the institution by which 'we inculcate and pass down many of our most cherished values, moral and cultural,' requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." Bellotti v. Baird, 443 U.S. 622, 634 (1979) (citing Moore, 431 U.S. at 503-04). Because the familial relationships affected by the statute here do not all fall within the paradigmatic "traditional" family structure, it indeed requires particular "sensitivity and flexibility" to appreciate fully the subtle yet far-reaching intrusions into the "integrity of the family unit," Stanley v. Illinois, 405 U.S. 645, 651 (1972), wrought by this statute.

It is well established that the "interest . . . of a [parent] in the children . . . undeniably warrants deference and, absent a powerful countervailing interest, protection." Stanley v. Illinois, 405 U.S. at 651. And see Moore, 431 U.S. at 503 n.12; Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). "Suffice it to say that this is not the first time this court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes . . . 'the liberty . . . to direct the upbringing and education of children.'" Griswold, 381 U.S. at 502 (White, J., concurring) (quoting Pierce v. Society of Sisters, 268 U.S. 510, 524-25 (1925)). The parent's interest in providing for the child's upbringing and ensuring the child's health and material well-being continues concommitant with the obligation to do so, after the original family structure has dissolved.

Under the statute at issue here, however, "[t]he non-custodial parent is apt to be discouraged from continuing to play a supportive role when his or her money is being collected by the state and paid to other children." Baldwin v. Ledbetter, 647 F. Supp. 623, 639 (N.D. Ga. 1986). In effect, the statute requires the transfer of the parent's support payments away from the child for whom they were intended -- and to whom the parent has not just a legal obligation, but a right, to provide support -- and the redirection of that support to other, unrelated children. It usurps to the state a critical aspect of the relationship between a non-custodial parent and the child. In fact, rather perversely, the family relationships actually affected by the statute are only those in which the parent has conscientiously fulfilled parental obligations. See infra Point IV. No government ought to be allowed

to tell parents that they cannot support their own children except to the extent that the state decides to pass along as much of the support as it determines that the child "needs."

Conversely, as one court has reasoned, "[i]f the role of the parent is so fundamental as to deserve special protection, then certainly the child has the right to enjoy the nurturing and guidance afforded by a parent willing to discharge his or her obligations." Baldwin v. Ledbetter, 647 F. Supp. at 638. The statute at issue short-circuits this right to a supportive parent-child relationship.

The federal appellant argues that "family members who reside in the same household, family members who are bound together by close and lasting emotional ties, are likely to share their resources and responsibilities." Brief of Appellant United

States (hereinafter U.S. Br.) at 46. But children receiving support payments receive them from someone to whom they are also "bound together by close and lasting emotional ties": the parent. The child is thus torn between "close and lasting emotional ties" to siblings and filial loyalty to the compelling desire of the non-custodial parent to help support the child at a minimum level of need. As the court below observed, no child "should be faced with a choice between parental relationships and financial survival." Order of Aug. 25, 1986, Gilliard v. Kirk, Civ. No. 2660 (W.D.N.C.), reproduced in Appendix to Jurisdictional Statement at A-144, A-147.

The intra-family "conflicts of interest" that the statute creates do not stop there, but pit one child against that child's half-siblings. While self-sacrifice for family members is undoubtedly a virtue, a child has

no legal duty to act selflessly, and it is quite another thing still for the government to require parents to teach this virtue to their young by putting the children to a choice between their rights -- including the right to receive parental support, at a level usually judicially determined to meet their essential needs -- and those of their siblings.

This Court has been loath, in fact, to allow parents voluntarily to require their children to surrender legal protection of their welfare in the name of moral duty. See Prince v. Massachusetts, 321 U.S. at 170 ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."). The government can hardly man-

date, then, that parents subject a child to such a morality test.

King Solomon probed a mother's love for her child by threatening to slice the child in half. If he were living in our day, King Solomon would not have such an awesome threat at his disposal, so he might test the mother's love by instead threatening to slice the child's meager means of subsistence. The statute at issue in this case, however, introduces a twist that King Solomon, in his wisdom, did not: The custodial parent must agree to either the slicing of one child's independent right to what may be only minimal subsistence or the withholding of all sustenance whatsoever from the other children. 2/

2/ Family law principles require that child support payments be used solely to promote the interests of the child to whom they are directed. See Gilliard v. Kirk, 633 F. Supp. 1529, 1548-49 (W.D.N.C. 1986); Tyndall v. Tyndall, 270 N.C. 106, 153 S.E.2d 819 [footnote cont'd]

There is, of course, a third ugly alternative: breaking up the family unit. This Court has suggested that family life is not unconstitutionally burdened simply when higher benefits might be available to a family if its members were to live apart, in more than one household. See, e.g., Dandridge v. Williams, 397 U.S. 471 (1970). Here, however, the family's benefits are not merely reduced to some degree if it chooses to remain together; rather, if the supported child

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(1967); Goodyear v. Goodyear, 257 N.C. 374, 126 S.E.2d 113 (1962). Appellants would stretch the plain sense of this duty to mean that an obligation to spend money solely on behalf of a particular child can be met by spending money on behalf of others. The government attempts to obscure the novelty (to say the least) of this assertion by noting that a child cannot "constrain his mother to spend [his father's support payments] exclusively on items that he alone will be permitted to use." U.S. Br. at 33. Obviously, a mother may, consistent with her obligation to spend the money for the child's benefit and not that of herself or others, spend a child's support money on his share of inherently shared purchases. That does not mean that she may, consistent with her legal obligations or the interests of the child or the father, spend the support payments to pay anyone else's share of these shared expenditures.

is to retain the minimal parental support to which the child is legally entitled, the household must be separated for the other children even to be eligible for benefits. Cf. Lyng v. Castillo, 106 S. Ct. 2727, 2730 n.3 (1986) (distinguishing Moreno, 413 U.S. 528) ("Unlike the present statute, the 1971 definition completely disqualified all households in the [applicable] category. . . . We concluded that this definition did not further the interest in preventing fraud, or any other legitimate purpose of the . . . Program.").

Thus, the custodial parent is put to quite a different choice under this statute than under one where a family might simply reap a slight economic benefit in living as two households. Cf. Castillo, 106 S. Ct. at 2730. The parent must choose among fulfilling the support duty to one child; signing away that child's legal right in

order to allow the other children in the family to obtain subsistence support; or breaking up the family. This is a choice of child versus child, to which no civilized government ought to put any parent, and represents such a uniquely inhuman set of alternatives as to invoke this Court's declaration that "the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights as they have been understood in 'this Nation's history and tradition.' [Moore], 431 U.S. at 503." Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977) (footnote omitted).

This statute, then, manages to implicate and intrude upon, seriatim, the complete matrix of relationships that make a family -- no matter how dispersed -- a family. It tells children to choose between basic neces-

sities for themselves or basic necessities for their siblings, and to choose between a supporting parent's intentions and desires and their siblings' needs. It forces a parent to choose between the needs of one child or those of another, and sets the father's interests and obligations at odds with the mother's.

Few governmental schemes, short of physical intervention, so deeply intrude into so many aspects of family relations and decisions and so divide a house against itself. "[U]nless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the . . . Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." Moore, 431 U.S. at 501.

III. THIS COURT HAS CONSISTENTLY APPLIED HEIGHTENED SCRUTINY WHEN SOCIAL WELFARE LEGISLATION DIRECTLY AND SUBSTANTIALLY BURDENS A FUNDAMENTAL RIGHT

A. Heightened Scrutiny Is Normally Applied When Fundamental Rights Are Burdened. Minimal Scrutiny Is Utilized Only When The Welfare Requirement Burdening Such Rights Is Minimal.

Appellants argue erroneously that this Court's opinions "point unerringly to the principle that the proper standard for judicial review of social legislation is MINIMAL SCRUTINY." Brief of Appellant State of North Carolina (hereinafter State Br.) at 10 (emphasis in original); see also U.S. Br. at 40-41, 43 & n.16. This Court has laid down no such blanket rule that eligibility qualifications for a social welfare program are always subject only to minimal scrutiny simply because what is in question is "merely" social legislation. "When [government] undertakes such intrusive

regulation of the family . . . the usual judicial deference to the legislature is inappropriate." Moore, 431 U.S. at 499.

As this Court has recently reaffirmed, for instance, eligibility lines may not be drawn for social welfare programs on the basis of religious affiliation or belief. See Hobbie v. Unemployment Apps. Comm'n, 55 U.S.L.W. 4208 (Feb. 25, 1987). The Court held that "such infringements must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest," id. at 4209, and rejected in such instances a standard that the government need only "demonstrate[] that a challenged requirement for governmental benefits . . . is a reasonable means of promoting a legitimate public interest." Id. (quoting Bowen v. Roy, 476 U.S. ____, ____ (1986)).

Similarly, the Court recently restated in the context of the right to travel

interstate the principal that when a law "infringes a constitutionally protected right, we undertake intensified equal protection scrutiny of the law." Attorney General of New York v. Soto-Lopez, 106 S. Ct. 2319, 2321 (1986) (op. of Brennan, J.) See also Shapiro v. Thompson, 394 U.S. 618 (1969).

In fact, any fundamental right -- including fundamental family rights -- calls for heightened scrutiny when substantially burdened by governmental action. The source of the fundamental right -- whether the first amendment, the privileges and immunities clauses, the due process clauses, or various provisions of the Bill of Rights -- does not dilute this conclusion. The majority of Justices who have addressed the issue have found that protection of family interests does not occupy a less preferred constitutional position. As Justice White has noted

on more than one occasion, "Surely the right invoked in this case, to be free of regulation of the intimacies of [familial] relationship[s], 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" Griswold v. Connecticut, 381 U.S. at 503 (White, J., concurring) (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (opinion of Frankfurter, J.)).

Heightened scrutiny is thus called for unless the intrusion into these interests is insubstantial or indirect. See Lyng v. Castillo, 106 S. Ct. at 2729 (quoting Zablocki v. Redhail, 434 U.S. at 386-87 (heightened scrutiny required when social legislation "directly and substantially" interferes with right of family association and privacy).

B. The Cases Applying Minimal Scrutiny Are Inapplicable Here.

The distinction between "direct and substantial" and "indirect or insubstantial" interference, which determines when only minimal scrutiny need be employed, is more subtle than simply the distinction between an outright prohibition in haec verba, on the one hand, and everything else, on the other. For instance, in Zablocki, the Court found a "direct and substantial" interference with the right of marriage in a statute that did not prohibit marriage outright, but conditioned state permission upon the meeting of certain conditions. Zablocki, 434 U.S. at 375. Moreover, as the Court recognized in Hobbie, conditioning receipt of government benefits upon "voluntary" relinquishment of the exercise of a fundamental right is impermissible because "[g]overnmental imposition of such a choice puts the same kind of

burden upon [the exercise of a right] as would a fine." 55 U.S.L.W. at 4209

The burden on fundamental rights is even more direct and more substantial here. Not only are families required to choose between subsistence and familial relationships, but, as discussed supra Point I, the government-imposed choice directly intrudes upon family decisions and rends family relationships. The cases cited by appellants in which the Court has subjected social welfare legislation to only minimal scrutiny, U.S. Br. at 43 n.16; State Br. at 10, may be readily distinguished from the situation here.

In Lyng v. Castillo, 106 S. Ct. 2727, the burden imposed may have been direct, but the Court found it insubstantial. Close relatives who chose to live together suffered a reduction in benefits as a direct result of that decision. Writing for the Court, Justice Stevens noted, however, that the statu-

tory classification at issue was unlikely to have a substantial effect upon that choice. First, the classification at issue did not "completely disqualify all households" failing to meet its qualifications, as did the statute invalidated in Moreno, 413 U.S. 528. Castillo, 106 S. Ct. at 2730 n.3. Second, "in the overwhelming majority of cases[, the burden] probably has no effect at all. It is exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps, for the cost of separate housing would almost certainly exceed the incremental value of the additional stamps." Id. at 2730 (emphasis added).

Here, however, the statute is exceedingly likely to impinge upon the family's choices. Unlike the statute in Castillo, families who fail to execute a mandated act that cuts into many facets of familial inter-

actions lose all eligibility for AFDC benefits. A family might not choose to live apart "simply to increase their allotment"; families that do not agree to the assignment provision under the statute at issue here, however, are faced with the choice of living apart or receiving no benefits whatsoever.

Furthermore, Castillo implies that the insubstantiality of the burden can be ascertained by comparing the net economic benefit of living apart (higher benefits minus additional cost of separate housing) and that of living together (scale economy of living together minus decrease in benefits). Id. This suggestion comports with common sense, as the benefit decrease is designed explicitly to reflect the scale economy that can be achieved by living together.

Here, however, the family does not achieve a benefit even roughly equal to the diminution in their allotment. The "penalty"

for living together is not, as in Castillo, a rough recoupment of the savings that accrue to the family for doing so, but rather consists of the forfeiture by the children of their child support income, in an amount, obviously, utterly unrelated to -- and generally greatly exceeding -- the economies of living together.

In addition, the weight of this "penalty" for familial cohabitation does not fall on the entire family, as an offset to the scale economies realized by the family, as in Castillo. Rather, it falls only upon the child receiving the support payments. Thus, one might conclude in Castillo that familial living choices are little affected because the family in toto comes out roughly the same under either option; but here a particular family member -- a child, no less -- does come out far worse if that child remains with his or her siblings. This

greatly encourages either the separation of the children in the household or the disrupting of the relationship between non-custodial parent and child. The logic of Castillo thus is not applicable here.

Neither, on the other hand, is the logic of such social welfare cases as Weinberger v. Salfi, 422 U.S. 749 (1975). In Salfi, widows of former recipients of disability benefits were ineligible for continued benefits if they had been married to the deceased for less than nine months. The total denial of benefits is clearly a "substantial" burden, as discussed supra. See Castillo, 106 S. Ct. at 2730 n.3. The requirement imposed in Salfi was not, however, "direct." At the time that the couple were married, they could not have known that the marriage would last less than nine months; the qualification therefore could not have deterred their decision to enter into marriage. The provision

in question in Salfi therefore did not "directly" burden the right in question because it could not realistically effect the exercise of that right.

The case presently before the Court is clearly distinguishable. Here, the decision to live together as a family, as well as all the other familial concerns discussed supra Point II, are all directly burdened by the government disincentives: The imposition of the financial penalty depends directly upon the family decisions made by the mother and child, and its effects directly influence those decisions. 3/

3/ Thus Schweiker v. Wilson, 450 U.S. 221 (1981), is inapposite, as well. The classification at issue did not "classify directly on the basis of mental health." Id. at 231, and defined as "indirect" an action whose burden is not directed at all members of a suspect class, and whose burdened group is not comprised only of the suspect class. Id. at 231-32. Here, however, a statutory provision operates directly upon family decision making, rather than, as in Wilson, upon a completely different choice or status [footnote cont'd]

The other category of cases in which this Court has applied minimal scrutiny in the social welfare context is cases in which eligibility for benefits has been tied to marital status. See Bowen v. Owen, No. 84-1905 (May 19, 1986); Califano v. Jobst, 434 U.S. 47 (1977); Mathews v. De Castro, 429 U.S. 181 (1976). The right to enter into, or dissolve, a marriage is fundamental, see Zablocki 434 U.S. at 383-86; Boddie v. Connecticut, 401 U.S. 371 (1971). This does not mean, however, that marital status can never be used as a proxy for such things as dependency status especially when no infringement on the fundamental right to enter into or dissolve a marriage results

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that happens to affect the choice or status in question only partially and non-disparately. See id. at 233 ("[T]his record certainly presents no statistical support for a contention that the mentally ill as a class are burdened disproportionately to any other class affected by the classification.").

> Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families.

Jobst, 434 U.S. at 53. Similarly,

> [d]ivorce by its nature works a drastic change in the economic and personal relationship between a husband and wife. Ordinarily it means that they will go their separate ways. Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married.

De Castro, 429 U.S. at 188. In neither Jobst nor De Castro was there any indication that the use of marital status as a proxy induced people to marry or not, or to divorce or not.

The presumption deployed here, however, is completely different. It does not merely use family relationships as a proxy for a valid governmental classification imposing no more than an indirect "tax" on a status or

decision. Instead, it acts directly upon family relations, creating, and unvoidably requiring family members to choose between, conflicting family loyalties and interests.

In addition, the presumption that children receiving child support for their sole benefit (and the parents administering the support payments) spend a hefty share of it on other children actually runs counter to the legal expectations rightfully held by the provider of support and the legal obligations imposed upon the custodial parent. "When an order of support is entered by a court, it is reasonable to assume compliance occurred." Matthews v. Lucas, 427 U.S. 495, 514 (1976). The family interest in question, therefore, does not merely serve as a passive and easy "proxy" for a factor not accorded heightened scrutiny. Family interests are themselves directly affected here in a manner that they are not in the Jobst line of

cases. These cases are therefore inapposite to the analysis required here.

Thus, unlike the statutes involved in any of the cases relied upon by the appellants, the child support "attachment" at issue here both directly and substantially interferes with family decisions and burdens family rights.[4/] The cases employing only

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[4/] The other cases cited by the appellants in support of their contention that only minimal scrutiny need be employed, see U.S. Br. at 43 n.16; State Br. at 10, are wholly inapplicable to this case. None involves either the burdening of a fundamental right or the use of a suspect classification. The Court in Mathews v. Lucas, 427 U.S. 495, "disagree[d]" that "legislation treating legitimate and illegitimate offspring differently is constitutionally suspect," id. at 504 (citation, footnotes omitted), and noted that it "does not interfere in any way with familial relations." Id. at n.8 (emphasis added).

Similarly, Califano v. Aznavorian, 439 U.S. 170 (1978), presented no infringement on a fundamental right. The freedom of international travel at issue in Aznavorian has not yet been recognized by the Court as a fundamental right, but rather as only a "liberty interest," id. at 176, not entitled to the same heightened scrutiny accorded a fundamental right.

Schweiker v. Hogan, 457 U.S. 569 (1982), is utterly inapposite. Not only was no fundamental right implicated, but there was no suggestion that a suspect classification was involved. The appellees themselves challenged the statute only on rationality grounds. [footnote cont'd]

minimal scrutiny, therefore, are entirely inapplicable here. Heightened scrutiny must be applied in this case.

Id. at 588.

IV. THE STATUTE IS IRRATIONAL.

Because the statute directly and substantially burdens fundamental family interests, it must be subjected to heightened scrutiny. Even under minimal scrutiny, however, the statute cannot withstand constitutional challenge: It is utterly irrational.

This irrationality can most readily be seen by using the "simplified example" supplied by the federal appellant. See U.S. Br. at 10-11, 14-15. Assume a family of four, consisting of three children and one parent, and assume that one of the children receives child support payments in the amount of $200 per month.

Prior to the 1984 amendment, the family could have excluded that child from the filing unit; the filing unit would then have consisted of one parent and two children, with no income, "and it would have received

the maximum AFDC benefit for a family of that size, perhaps $250. Thus, when the excluded child's separate income was added in, the aggregate monthly income of all members of the family would have been $450." Id. at 11.

The concept of the family's "aggregate income," as employed by appellant, is misleading: The child receiving child support is entitled to its exclusive use; thus in the federal government's "simplified example" the more proper summary would be that, before the 1984 amendment, the child receiving support payments would be exclusively entitled to a $200 per month level of subsistence, while the remaining three family members would have income available to them of $250 in the aggregate, or approximately $83 each.

As appellant then observes, under the 1984 amendment, if the family applies for AFDC, the child receiving child support must

be included in the filing unit. "It is now a filing unit of four (one parent and three children) with a [nominal] monthly income of $200," U.S. Br. at 11; only $50 is allowed to pass to the family. "Under the amended statute, . . . that $50 would be disregarded in determining the family's income for AFDC purposes; and the family would be treated as a filing unit of four with no income, entitling it to $300 in monthly benefits." Id. at 14-15.

Hence, the family as an aggregate now receives income totaling $350 -- $300 of which come in the form of AFDC benefits -- as compared to pre-1984 when it would have received $450 in income, only $250 in the form of public assistance. Thus, the statute has increased the family's dependency on public assistance (both in absolute and percentage

terms), while reducing its income. 5/ The state's net welfare load has therefore increased, as well, except to the extent that it can collect from absent parents; as discussed supra, the statute itself makes such parents less forthcoming with support payments.

Looking at the incomes of individual family members, rather than at the aggregate, one finds that where formerly three family members received incomes of approximately $83 each and the child supported by the non-custodial parent received an income of $200, under the 1984 amendment all family members now receive approximately $87 each month. Thus, the effect of the statute is to maintain AFDC payments for the remainder of the family at essentially the same level, but to require a child receiving support payments

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5/ This "simplified example" is quite realistic. See Baldwin v. Ledbetter, 647 F.Supp. at 626-27.

from a parent to relinquish to the state somewhat more than half of his or her prior income; the remainder must come from the state and not from the parent.

As the district court observed, "Historically, public policymakers have seen the enforcement of child support obligations as essential to keeping children off welfare. . . . Here the angry [parents] do not abandon their children to welfare; they see children they are supporting conscripted into the welfare system." Gilliard v. Kirk, 633 F. Supp. at 1560.

The federal appellant offers two rationales for this rather bizzare goal. "The purpose of this provision," appellant asserts, "was to relieve the deserted mother of the burden of enforcing the abandoning father's child-support obligations, and to transfer that burden to the states with their greater resources and better collection tech-

niques." U.S. Br. at 12-13. "If a mother decides to apply for AFDC benefits, that decision . . . removes from her shoulders and from the shoulders of her child most of the consequences of child-support delinquency." Id. at 38. A noted, however, in return for "removing from the shoulders of the child" the vicissitudes of support arrangements with the child's actual parent,[6/] the 1984 amendment merely maintains AFDC payments to the siblings at essentially the same level as before the amendment while slashing to a small fraction of the original amount the income formerly received by the child entitled to child support.

6/ It is not clear why the "greater resources and better collection techniques" of the states cannot be employed on the child's behalf without the child surrendering to the state virtually all of the support payment. If that were the only way to invoke the legal mechanisms requiring child support, then "child support" payments would really be nothing but a tax imposed on non-custodial parents, a minor portion of which would be paid out by the state as welfare payments to the child.

This might be justified if the state were offering the child lower but certain benefits for giving up the uncertainty of whether the non-custodial parent will "pay up." In fact, however, the statute still requires the child to bear this risk: The state pays the family its $50 of child support funds only when it actually collects such funds from the absent parent. The child still must wait to see if the non-custodial parent will make good on the support obligation; now, however, if the parent does pay, the state will keep the bulk of the money.

Most importantly, however, the statute achieves exactly the opposite of what appellants claim it does. Before the 1984 amendment, the custodial parent could elect to assign the child support to the state in return for including the child in question in the AFDC filing unit. This bargain would make sense to the custodial parent and child

if the non-custodial parent rarely or never made the support payments. Thus, even before the enactment of the 1984 amendment, every family that would ostensibly benefit under appellant's argument was afforded exactly the protection appellant invokes to justify the 1984 amendment.

The 1984 provision, however, made assignment mandatory if the other children in the household were to be eligible for any AFDC assistance. This requires children who would not have volunteered under the previous arrangement -- those whose absent parents actually were already fulfilling their support obligations -- to assign their payments. "The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." Parham v. J.R., 442 U.S. 584, 603 (1979) (emphasis in original).

Any child who does not receive his or her rightful support payment plainly surrenders nothing by assigning that payment to the state. The only children and families who suffer the marked decrease in income discussed above are those whose absent parent actually pays the child support the parent is supposed to pay. These are precisely the children who do not need the state's assistance in collecting from their parents -- but they are the only ones "assisted" by the 1984 amendment. As the district court observed first-hand, the (predictable) result of such an arrangement is to discourage payment by the only parents who, without the 1984 amendment, were making them. Gilliard v. Kirk, 663 F. Supp. at 1535-43.

In United States Department of Agriculture v. Moreno, 413 U.S. 528, this Court held unconstitutional, as "wholly without any rational basis," a provision that

"in practical operation . . . exclude[d] from participation in the food stamp program, not those persons who are 'likely to abuse the program,' but, rather, only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." Id. at 538 (emphasis in original).

Here, the statute, in practical operation, burdens not those children whose parents do not meet their obligations, but, rather, only children whose parents do, but who live with siblings so desperately in need of aid that they cannot realistically refuse to sign away their parent's support so that their siblings can attain eligibility. This statute, too, then, is "wholly without any rational basis."

Since the clear effect of the 1984 amendments, especially when contrasted with

the optional assignment provision it replaced, is actually to penalize those parents who make and those children who receive child support payments, and since it has no effect on parents and children who do not, the statute cannot rationally be justified as a measure promoting the fulfilling of child support obligations.

Appellant therefore offers a second rationale for the statute asserting that:

> Congress decided in 1984 to ensure "that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole" [citation omitted]. . . . It reasonably concluded that closely-related family members who reside together are likely to share the expenses of common necessities and should be regarded as a single family unit.

U.S. Br. at 20. This reasoning reveals several flaws, however. First, the income of the child receiving child support is by def-

inition not available to the other children; to allocate it as appellant suggests would violate the rights of the child and interests of the non-custodial, supporting parent. This legal restriction on its use clearly distinguishes support payments from all other forms of income.

Second, while Congress might reasonably conclude that closely related family members living together share their expenses, if not their incomes, the structure of AFDC benefits already takes into account the economies the family achieves by sharing expenses. Larger families can generally live together with lower average overhead than can smaller families, because some of the expenses of living are shared so that additional family members do not impose as large a marginal cost on the family:

This common sense economic principle of scale economy is already taken into account,

then, in the formula for calculating AFDC payments. To the extent that families living together share expenses, so that a family of four realizes economies of scale over a family of three, the government has, since long before the 1984 amendment, structured AFDC benefits accordingly.

If Congress' true concern were with allowing three members of a family to receive benefits at a higher rate than appropriate because they benefit from the presence of a fourth consumer in the household, Congress already had the means to deal with this problem at its disposal: include in the filing unit, for purposes of calculating the benefit level for the family, the child receiving support payments -- i.e., four members in the "simplified example" instead of only three -- but withhold a pro rata share (one-fourth) for that child who rightfully chooses to retain separate child

support income and not receive AFDC benefits. In that way, Congress could have reduced the payments to the three beneficiaries in our example from $250 per month ($83 each) to $225 per month ($75 each), thus taking account of the already established per-person savings that accrue from the actual, larger family unit.

The 1984 amendment, then, does not simply take account of shared living expenses. It "attaches" child support payments as a condition of AFDC eligibility for the other family members and retains for the state amounts larger than necessary to account for shared expenses. This rationale, then, is unsupported at best, pretextual at worst.

In sum, this statute is wholly irrational. As a means for adjusting AFDC payments for the savings that accrue to family members for sharing living expenses it irrationally seeks to attach most of the legally separate

income of the child receiving support payments. As a program for encouraging the payment and collection of child support, it takes money only from those families who are successful at collecting child support without governmental interference, reduces the incomes of the families in aggregate and the children individually who do receive such support, and discourages those parents who made good on their obligations. It would have been hard to have drawn the statute any more irrationally; it cannot withstand constitutional scrutiny.

CONCLUSION

For the foregoing reasoning the judgment of the district court should be affirmed.

Respectfully submitted,

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